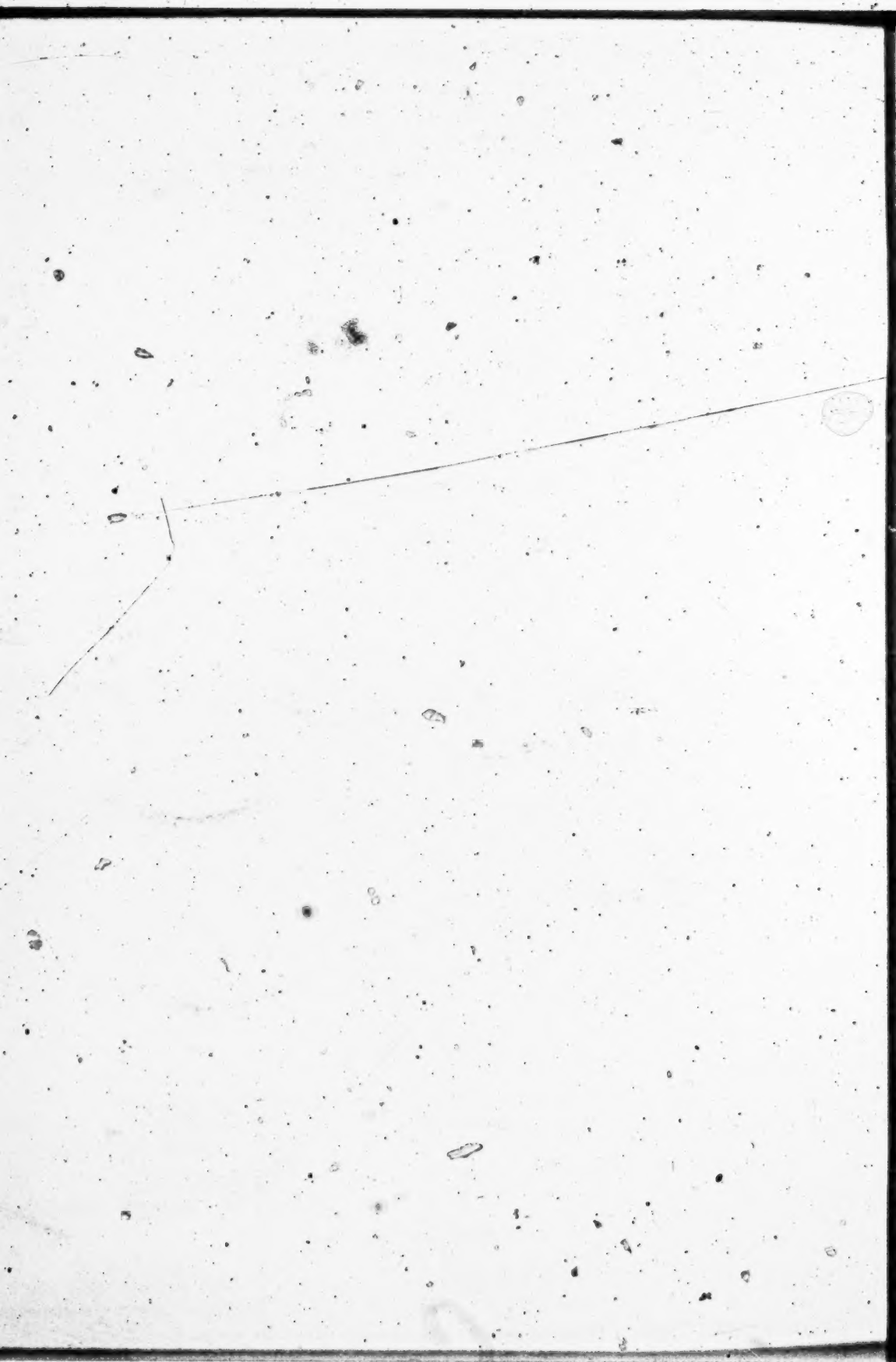

SUPREME COURT, U. S.

JUN 8 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1375~~ 147

K-91, INC.,

Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

SIMON H. RIFKIND
575 Madison Avenue
New York, N. Y. 10022

J. PAUL COIE
1900 Washington Building
Seattle, Washington 98101
Attorneys for Respondents

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

HOLMAN, MARION, PERKINS, COIE & STONE
Seattle, Washington
Of Counsel.

June 7, 1967

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
The Decisions Below	2
Statement	4
Introduction	4
The Affirmative Defenses	5
The Respondents and ASCAP	6
ASCAP's Relations With its Members	7
ASCAP's Licensing Activity	8
ASCAP's Washington Licensing	11
1. The 1959 rate proceeding	11
2. Petitioner's refusal to take a license	14
3. Other infringers	15
Argument	16
The Options Available to Petitioner	16
"Price Fixing" and "Block Booking"	17
Alden-Rochelle and Witmark	19
Performance Licenses for Recording Companies	20
Conclusion	22

CITATIONS

PAGE

CASES:

Alden-Rochelle, Inc. v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) 19

Ferree v. *Doric Co.*, 62 Wn. 2d 561, 383 P. 2d 900 (1963) 19

M. Witmark & Sons v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948) 19

Shenandoah Valley Broadcasting, Inc. v. *ASCAP*, 331 F. 2d 117 (2d Cir. 1964), *cert. denied*, 377 U. S. 997 (1964) 19

United States v. *ASCAP*, Civ. Action No. 13-95 (D. C. S. D. N. Y.) 7

United States v. *Loew's Inc.*, 371 U. S. 38 (1962) 18

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) 18

STATUTES:

17 U. S. C. § 1 21

28 U. S. C. § 1254(1) 1

Chapter 19.24, Revised Code of Washington 5, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

K-91, INC., *Petitioner,* v. GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION, *Respondents.*	No. 1375

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the United States District Court for the Western District of Washington (Solomon, J.) is printed as Appendix B to the petition.

The opinion of the Court of Appeals for the Ninth Circuit is printed as Appendix C to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1).

Question Presented

The question presented by the petition is whether the District Court and the Court of Appeals erred in finding that the activities of the American Society of Composers, Authors & Publishers ("ASCAP"), an unincorporated membership association to which each respondent belongs, did not constitute a combination in restraint of trade or a monopoly within the meaning of the antitrust laws.

The Decisions Below

This is an action for copyright infringement which respondents commenced in the United States District Court for the Western District of Washington, Northern Division (R. 1).* Respondents are the copyright proprietors of the four musical compositions named in the complaint.

Petitioner is the owner and operator of radio station KIXI in Seattle, Washington.

This action was consolidated for trial together with five other infringement actions commenced by respondents and other copyright proprietors against two other radio broadcasting corporations in Washington and the president and principal stockholder of one of them. (The actions were tried before the Honorable Gus G. Solomon, Chief Judge of the United States District Court for the District of Oregon, sitting in these cases pursuant to designation by the district court judges in Washington.)

---

*"R." refers to documents in the record on appeal in the Court of Appeals as listed in petitioner's designation of the record on appeal and respondents' counterdesignation. "Tr." refers to pages in the trial transcript. "P. Ex." refers to plaintiffs' (respondents') exhibits. "D. Ex." refers to defendant's (petitioner's) exhibits. "App." refers to pages in the appendices annexed to the petition.

The District Court, after studying the statement of admitted facts, the evidence advanced at the trial, the exhibits and the memoranda of authorities submitted by the parties, concluded that (App. B, p. A9):

> "Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants."

Although the trial court found that petitioner had deliberately appropriated respondents' property and had greatly profited by its wrongful conduct, the Court fixed damages against petitioner at the statutory minimum of $250 per infringement for each of the four infringements alleged in the complaint (R. 37, Conclusion 20).

The Court of Appeals, after careful consideration of the impact of the Amended Final Judgment, affirmed the District Court's decision. Judge Barnes, speaking for the Court, wrote (App. C, pp. A18-A19):

> "We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable; and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the

price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.

"There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws."

Statement

Introduction

Petitioner's statement contains many errors and large amounts of irrelevant material.* It becomes necessary, therefore, to state the relevant facts, as stipulated by the parties before trial (R. 30) and as found by the trial court (R. 37) and affirmed by the Court of Appeals.**

*It would be pointless to correct each of the numerous factual errors contained in the petition. But, by our failure to correct petitioner's misstatements, we by no means acquiesce in them.

**In the Court of Appeals, petitioner sought to find error in the failure of the trial court to make certain findings of fact. The Court rejected petitioner's contentions (App. C, pp. A15-A17) and they have not been repeated here.

To begin, it is important to place in its proper perspective petitioner's conduct which gave rise to this lawsuit, particularly in view of (1) the statement in the petition that this is some kind of "test case" and (2) petitioner's claim that it has admitted infringing respondents' copyrights in order to present some other issues clearly for decision (Pet., pp. 3-4).

We are not here concerned with just four admitted infringements of respondents' copyrights. The trial court found that petitioner had regularly broadcast the musical compositions of respondents and of other authors, composers and publishers over its radio station, for profit, without the consent of the copyright owner or any licensing agency and without the payment of any royalty or compensation of any kind to any person (R. 37, Fact 8).

This was done, the trial court found, "pursuant to deliberate policy, long persisted in, and without any regard to the rights of plaintiffs and other copyright proprietors under the federal copyright law" (R. 37, Fact 9).

These facts permit no conclusion but that petitioner was a deliberate and willful infringer. The trial court so found, and its finding was not challenged in the Court of Appeals and is not here challenged.

The Affirmative Defenses

Accordingly, all that remained for consideration in the courts below was the sufficiency of the affirmative defenses urged by petitioner as justification for its appropriation of respondents' property. Of the affirmative defenses, only one has been urged in this Court:* petitioner contends that respondents, together with ASCAP, have violated the

*The other defenses urged by petitioner in the courts below were based on respondents' alleged violation of a Washington statute, Ch. 19.24, R. C. W. Clearly, the decisions of the lower courts—that there had been no violations of Washington law—raise no issues warranting review by this Court.

federal antitrust laws in the use of their copyrights and are therefore barred from maintaining this action.

At the trial of this action and in the Court of Appeals, it was abundantly demonstrated that there was no merit in petitioner's affirmative defense based on the federal antitrust laws—neither factually nor legally.

The District Court so held and the Court of Appeals affirmed. The decisions below were clearly correct.

The Respondents and ASCAP

Respondents and the other plaintiffs below—among them Richard Rodgers, Irving Berlin and the late Cole Porter—include some of the most talented and successful writers of popular music in the United States today. They are all members of ASCAP, an unincorporated membership association which is organized under the laws of the State of New York and has over 8,800 authors, composers and publisher members who own copyrights in separate musical compositions (R. 30, Facts 10, 11).

Before the organization of ASCAP, there was no effective method by which individual writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could take the measures necessary to negotiate licenses with all users or to detect all unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of infringement had no practical means of obtaining licenses from the owners of all those works.

As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated association representing both writers and publishers.

ASCAP's Relations with its Members

Each member of ASCAP, including respondents, has granted to ASCAP only the *non-exclusive* right to license non-dramatic public performances for profit of all the compositions written, composed or published by such member during the term of his membership in ASCAP, and has received the right to share in the royalty distributions made by the Society.

Thus, each member of ASCAP remains absolutely free to license public performances of his musical compositions. And a would-be licensee is free to deal either with the individual copyright proprietor or with ASCAP.

The relationship between ASCAP and its members is governed by the ASCAP Articles of Association, by agreements executed by each member and by the Society, the "General Agreement" (D. Ex. A-5), and the "Television Agreement" (P. Ex. 10), by the extensive provisions of the Amended Final Judgment of March 14, 1950 (D. Ex. A-2), entered on consent in an antitrust action entitled *United States* v. *ASCAP*, Civil Action No. 13-95 (D. C. S. D. N. Y.), and by the Order of January 7, 1960 (D. Ex. A-3), entered in the same action. The Amended Final Judgment and the Order are the decrees now in effect; they superseded an earlier judgment, entered on consent in 1941.*

*The Court will note that in major respects the General Agreement and the Television Agreement are modified by the Amended Final Judgment of 1950. For example, the General Agreement (which was for the term 1941-1965 and was drawn up in 1940) provides on its face that the member "sells, assigns, transfers and sets over unto the Society . . . the right of public performance . . . in each musical work" of which the member is the copyright proprietor (D. Ex. A-5). But each copy of the General Agreement has had stamped upon its face language indicating that it is modified by and subject to the Amended Final Judgment. This latter document enjoins ASCAP from "Holding, acquiring, licensing, enforcing or negotiating con-

In distributing royalties, ASCAP acts as a clearinghouse for its members. In essence, royalty distributions are keyed to and are dependent upon an objective survey of the music actually played by radio and television broadcasters and other users. The ASCAP survey is supervised by the District Court in New York. Thus, the copyright proprietors of all music are rewarded commensurate with the popularity of their music as revealed by the objective survey. Popular music does not, as petitioner suggests, subsidize outdated music.

ASCAP's royalty distributions are regulated by the provisions of the Amended Final Judgment and the Order of January 7, 1960.

ASCAP's Licensing Activity

ASCAP licenses many thousands of users of music throughout the United States, ranging from the three national television networks to the local tavern which employs musicians for Saturday nights.

Most users want—and receive—the right to perform as often as they wish any of the more than one million musical compositions in ASCAP's repertory. One of the defendants below, for example, broadcasts 60,000 playings of musical compositions per year (R. 37, Fact 12).

Thus it may fairly be said that ASCAP performs a virtually indispensable service both for its members and for the users of the members' music. The trial court found (R. 37, Fact 25):

---

cerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis" (D. Ex. A-2, Sec. IV[A]). The Amended Final Judgment defines "right of public performance" as meaning "the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner" (D. Ex. A-2, Sec. II[B]). Hence, as a result of the Amended Final Judgment, ASCAP receives under the General Agreement only a non-exclusive right to license non-dramatic public performances for profit.

> "The licensing of public performances for profit of copyrighted musical compositions by licensing organizations such as ASCAP is the only practical way by which copyright proprietors may exercise their federally-granted right to license non-dramatic performances of their copyrighted compositions. No single copyright proprietor could deal individually with all would-be users of his copyrighted compositions, and it would be impossible for him to police the use of his copyrighted songs. Equally, most broadcasters and other users of copyrighted music could not deal separately with the thousands of copyright proprietors whose music they perform."

ASCAP's licensing activity is regulated and controlled in virtually every detail by the Amended Final Judgment of March 14, 1950 (D. Ex. A-2).*

The central theme of the Amended Final Judgment is that it guarantees any user the right to perform ASCAP music. He may deal on an individual basis with each member or on a collective basis with ASCAP. If he prefers a collective license he is assured that he will pay no more than a fair license fee.

Under Section IX of the Amended Final Judgment, when any would-be user of some or all of the compositions in the ASCAP repertory applies to ASCAP for a license, ASCAP is required to advise him of the fee which it deems reasonable for the license requested. The making of the application operates automatically to license the applicant. If the parties are unable to agree upon a reasonable fee, the applicant may apply to the United States District Court for the Southern District of New York for determination of a reasonable fee. In any such proceeding, the burden is on

---

*The Amended Final Judgment of 1950 is set out in Appendix A to our brief.

ASCAP to establish the reasonableness of the fee which it has requested.

Petitioner's statement that "ASCAP is permitted to fix the license fees it will charge," with the District Court having the power "to review the reasonableness of the proposed fee and set a different fee" (Pet., p. 6), simply misconceives the impact of Section IX. ASCAP has no power whatsoever to fix a license fee under that section—it can only offer and negotiate. And, if the parties cannot agree, ASCAP—not the user—has the burden of establishing the reasonableness of the fee which it has requested.

Once a reasonable fee has been finally determined by the Court, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP (D. Ex. A-2, Sec. IX[C]). And even without a Court order fixing a fair rate, ASCAP is forbidden at all times to discriminate "in license fees or other terms and conditions between licensees similarly situated" (D. Ex. A-2, Sec. IV [C]).

Thus, any would-be user of any part of ASCAP's repertory, including petitioner, is guaranteed that he can use that music and that he will pay no more than a fair license fee. For he has an absolute right to be free of discrimination; he is assured of equal treatment.

And if a would-be user for any reason desires not to deal with ASCAP, he is free to negotiate individual licenses with individual copyright proprietors. For under the Amended Final Judgement, as we have seen, each individual member of ASCAP retains the right to license public performances for profit of his musical compositions, and ASCAP is forbidden to license individual compositions except upon specific written request of both the member and the user (D. Ex. A-2, Sec. VI).

Would-be users of ASCAP music have made extensive use of the provisions of Section IX of the Amended Final

Judgment. In the past, when existing ASCAP licenses with radio or television broadcasters were about to expire, the broadcasters have joined together in industry-wide committees for the purpose of negotiating new terms with ASCAP (R. 37, Fact 30). On occasion, negotiations have been unsuccessful and the broadcasters have exercised the rights conferred by Section IX and commenced court proceedings for determination of a reasonable license fee (R. 37, Fact 30).

ASCAP's Washington Licensing

The Amended Final Judgment of course controls ASCAP's licensing activity with respect to broadcasting of music in the State of Washington, just as it controls in the other forty-nine states—and broadcasters in the State of Washington, like broadcasters in the rest of the United States, have exercised the rights conferred by Section IX. Indeed, the only licenses ASCAP now issues to broadcasters in the State of Washington were the product of a recent Section IX proceeding. Accordingly, it is pertinent briefly to review that proceeding:

1. *The 1959 rate proceeding.* In the years before 1959, some Washington broadcasters decided not to enter into license agreements with ASCAP; nor did they seek individual licenses from composers or publishers. This was, of course, their right. No broadcaster has any obligation to broadcast copyrighted music. If he broadcasts no material copyrighted by an ASCAP member, he needs no license from ASCAP or any member. But certain broadcasters wanted it both ways; they regularly broadcast copyrighted music and paid nothing to any copyright owner.

Other Washington broadcasters, perhaps mindful of their obligations under federal law or basic principles of

fairness, obtained licenses, paid license fees and so did not infringe.

Prior to 1959, some of the Washington broadcasters who had entered into agreements with ASCAP refused to pay the agreed license fees on the alleged ground that payment would violate a Washington State statute, Ch. 19.24, R. C. W. (R. 37, Fact 38, Tr. 341).

ASCAP's agreements with broadcasters in Washington and throughout the United States expired on December 31, 1958 (R. 37, Fact 39, Tr. 341). Early in 1959, a group of more than 700 radio broadcasters from all over the country, acting as an "all-industry committee," commenced a proceeding in the United States District Court for the Southern District of New York under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses, effective as of January 1, 1959 (R. 37, Fact 40, Tr. 341). Included among the petitioners were eleven broadcasters located in the State of Washington (R. 37, Fact 40, Tr. 341).

In that proceeding, the Court ruled that, in the circumstances presented—the refusal of certain Washington broadcasters to pay the agreed license fees on the asserted ground that payment would violate the Washington statute —ASCAP would not be required to issue licenses to any petitioning broadcaster in the State of Washington (R. 37, Fact 41, Tr. 341-342). Thereafter, during the pendency of that proceeding, until November 20, 1959, ASCAP did not offer licenses to Washington broadcasters (R. 37, Fact 42, Tr. 342).*

In the interim, negotiations were had by ASCAP's general counsel, Herman Finkelstein, and Ronald A. Murphy, president and counsel of the Washington State

*The foregoing facts constitute what petitioner describes as ASCAP's "refusal" to issue licenses to radio stations in Washington.

Association of Broadcasters. Mr. Murphy is counsel to petitioner in this case.

On November 20, 1959, Mr. Murphy filed a petition in the United States District Court for the Southern District of New York on behalf of nearly all the Washington broadcasters—the owners of 61 Washington radio and 7 television stations (P. Ex. 11). These petitioners asked the Court to issue an order (P. Ex. 11):

> "(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;
>
> "(b) determining and establishing the terms and conditions of such licenses."

At the request and with the consent of the petitioners, the Court (Ryan, C. J.) entered an order, on November 20, 1959, directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963 (P. Ex. 12).* Chief Judge Ryan found (P. Ex. 12):

> "6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation

---

*The 1959 rate proceeding involving Washington broadcasters, as well as prior and subsequent rate proceedings in which broadcasters all over the United States, acting through all-industry committees, have exercised the rights conferred by Section IX, demonstrate the lack of merit in petitioner's contention that Section IX confers only illusory rights on broadcasters located on the West Coast.

of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

"7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states."

The two specified license forms were the so-called "blanket" and "per program" licenses (R. 37, Fact 45). In broad terms, both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee payable is computed on the basis of the licensee's over-all revenues from sale of time on the air, after certain deductions (R. 37, Fact 45). Under the per program license, the licensee pays a higher percentage but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed (R. 37, Fact 45).

2. *Petitioner's refusal to take a license.* Although petitioner did not participate as a party in the 1959 rate proceeding, it knew what was going on (R. 30, Fact 75, R. 37, Fact 46). From time to time during the negotiations between ASCAP and petitioners, and subsequent to November 20, 1959, Mr. Murphy, counsel for the petitioning

radio and television stations, advised *all* Washington broadcasters of Chief Judge Ryan's order (P. Ex. 13).

Petitioner decided not to take advantage of either of the licenses made available under Chief Judge Ryan's order (R. 30, Facts 76, 77, R. 37, Facts 47, 48). It did, however, continue to infringe.

3. *Other infringers.* Petitioner was not the only infringing broadcaster in the State of Washington. Other stations—including some which had been petitioners before Chief Judge Ryan—also decided to infringe rather than pay the license fees which the Court had found to be fair, reasonable, and non-discriminatory.

Beginning in 1961, respondents and other copyright proprietors commenced lawsuits against 11 unlicensed radio stations in the State of Washington, including the present petitioner and the other defendant's below (R. 30, Fact 40, R. 37, Fact 63).

Except for this case, all of these lawsuits have now been settled by the broadcasters' taking ASCAP licenses retroactive to 1959—thus putting the infringers on a par with the broadcasters who had taken the licenses issued pursuant to Chief Judge Ryan's order (R. 49).*

Petitioner professes to see these lawsuits as part of a campaign to intimidate and coerce users into accepting ASCAP licenses. We suggest that it would be more appropriate to view these suits as an effort to put an end to many years of piracy of musical works of respondents and others and to redress the rights granted by Congress pursuant to the coypright clause of the Constitution.

---

*After the judgments below were entered, petitioner executed and tendered to ASCAP a retroactive license agreement covering the period January 1, 1959 to December 31, 1963 and extension agreements for 1964-1967. ASCAP has executed the tendered agreements and petitioner has paid license fees under the agreements.

ARGUMENT

The decision of the Court of Appeals was clearly correct. Moreover, it neither involved nor turned on any significant question of federal law that should be decided by this Court. Petitioner has failed to show any special and important reason for granting its petition for a writ of certiorari to review the decision below.

The Options Available to Petitioner

We submit that the single most important fact in this case is this: by virtue of the 1959 Washington rate proceeding, at any time after November 20, 1959, petitioner could have obtained a license from ASCAP to perform publicly for profit any musical composition in ASCAP's repertory, subject only to its obligation to pay a license fee which Chief Judge Ryan had determined to be reasonable, with the approval of petitioner's present counsel.

As the Court of Appeals noted, petitioner had five options available to it, four of which were lawful:

Petitioner could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely, any of the compositions in the ASCAP repertory. Or petitioner could have obtained a per program license which would have required it to pay a license fee only for those programs in which petitioner broadcast music from the ASCAP repertory.

And, if the foregoing alternatives were unacceptable to petitioner, it could have undertaken to deal with ASCAP members directly.

Or petitioner could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, petitioner chose the fifth—the unlawful—alternative. Petitioner never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in appropriating respondents' property without cause and without justification.

"Price Fixing" and "Block Booking"

Petitioner's affirmative defenses based on federal law are without merit. Respondents have not unlawfully extended their copyright monopolies nor are they guilty of violating the antitrust laws in any other respect.

Petitioner uses almost all the epithets know to the federal antitrust law—"price fixing," "block booking," "tying agreements," etc. But the hard facts are:

ASCAP has no power to fix license fees. Every would-be user of ASCAP's repertory has an absolute right either to obtain a license from the Society at a reasonable and non-discriminatory rate or he may deal directly with any individual member for a license on any mutually agreeable basis.

We can go further:

On the record before this Court, it is plain that ASCAP has not violated any antitrust law but has, in fact, established a classically free market in musical compositions. Buyers and sellers of the right to perform musical compositions are guaranteed free access to each other, and if their bargaining does not produce agreement on a fair price, a judge is standing by to adjudicate the matter.

On the supply side, any composer, author or publisher is insured ready access to the market where songs are licensed: ASCAP admits to membership anyone who meets certain minimal standards.

On the demand side, every user of music has an absolute right to obtain a license to the entire ASCAP repertory on non-discriminatory terms. He can not be excluded from the market by virtue of anyone's control of all or any part of it (and the right of a user to deal with individual copyright proprietors is preserved by the Amended Final Judgment's bar against ASCAP's interference in such dealings).

Finally, the burden of establishing reasonableness of rates is on the supplier.

Petitioner purports to see in ASCAP's blanket and per program licenses something akin to tie-in sales (where a seller refuses to sell Item A unless Item B is purchased simultaneously) or to "block booking" (a form of tie-in once employed in the motion picture industry, whereby an exhibitor could not obtain licenses to films separately, but was forced to obtain a license for a whole group of films); see *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States* v. *Loew's Inc.*, 371 U. S. 38 (1962). The evil in these practices is that the buyer is compelled to buy what he does not want in order to obtain what he does want.

But ASCAP imposes no such compulsion. True, it does offer licenses to its entire repertory—in effect offering a licensee a library card to use whatever he wishes, whether in existence at the time of the agreement or composed subsequently during the term of the agreement. And broadcasters regularly seek such licenses because of the convenience they offer. But a broadcaster is absolutely free to deal with the individual copyright proprietor if he wishes a license for individual songs. The broadcaster is not faced with an all-or-nothing proposal which raises antitrust objections to block booking and other forms of tie-ins.

Petitioner purports to find antitrust violations in the fact that the Amended Final Judgment empowers the District Court to determine a reasonable license fee. In petitioner's view, the antitrust laws outlaw judicial determination of a reasonable price.

Petitioner cites no authority for its novel view. We respectfully submit there is none.

Alden-Rochelle and Witmark

Although petitioner has no facts to support its contentions, it has sought to find the applicable law in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S. D. N. Y. 1948), and *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn. 1948).* Both cases involved ASCAP's relations with motion picture exhibitors 20 years ago—*prior to the 1950 Amended Final Judgment.*

As the Court of Appeals for the Second Circuit pointed out in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 331 F. 2d 117, 121 (2d Cir. 1964), *cert. denied,* 377 U. S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and had no provision for

*Petitioner's reliance on the opinion of the Superior Court of the State of Washington, Yakima County, in *Cascade Broadcasting Co.* v. *ASCAP,* No. 45877, is also misplaced. To the extent that the Washington Superior Court's opinion purports to deal with questions of federal antitrust law, it is entitled to little, if any, weight. Moreover, under Washington law it is entitled to no weight at all. No final order or judgment has been entered in the *Cascade* lawsuit and under Washington law an opinion by a court, prior to a final ruling, has no binding effect. *Ferree* v. *Doric Co.,* 62 Wn. 2d 561, 383 P. 2d 900 (1963).

judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S. D. N. Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought in 1950, we may note, Judge Leibell vacated the injunctive order which he had entered in *Alden-Rochelle*.

In consequence, *Alden-Rochelle* and *Witmark* are of only historical interest today. Neither is of any pertinence here.

Performance Licenses for Recording Companies

In its eager hunt for a reason to avoid paying for its infringements, petitioner advances one last theory: the Amended Final Judgment should be amended to require ASCAP and its members to license performing rights to record companies along with recording rights. Radio stations would then obtain the right to perform a copyrighted work by playing a recording of it whenever they acquired the recording either by purchase or gratis from a record company. Under this scheme, broadcasters could avoid having to obtain performance rights for their own performances because record companies would obtain the necessary rights for them.

We may note that, in the courts below, petitioner contended that ASCAP and its members had entered into a "conspiracy" to refuse to issue licenses to recording companies for public performance of recorded musical compositions on broadcasting stations. Petitioner has now abandoned its "conspiracy" theory—and for good reason. Not one single piece of evidence was ever adduced to support it.

There is no tacit understanding among ASCAP's members not to license performing rights to record companies. ASCAP and each member of ASCAP have the unfettered right to license performing rights to record companies. It is stipulated also that no record company has ever asked for such a license (R. 30, Facts 63, 64, 65, 66). Judge Solomon thus summarized and found the facts (R. 37, Fact 75):

> "There is no evidence that plaintiffs or other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing broadcasting stations to perform publicly for profit any musical composition."

Evidently, record companies are just not interested in going into the business of obtaining performance rights. And, we might suggest, for good reason. Record companies make money by selling records to the public for home consumption. The records which they sell or give to radio stations are but a tiny fraction of their business. Consequently, it makes no sense for a record company to obtain a performing rights license for thousands of broadcasters. The record company—which stands to gain little or no profit from sales to radio stations—has no reason to assume the broadcaster's responsibility of arriving at mutually agreeable terms with the owners or licensors of performing rights.

We may note here the provisions of the Copyright Law dealing with royalty payments for recording rights. 17 U. S. C. § 1 provides in pertinent part:

> ". . . whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on such

> part manufactured, to be paid by the manufacturer thereof . . .;"

17 U. S. C. § 1 goes on to provide that payment of this royalty for the right to record

> "shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit."

Thus, the Copyright Law itself contemplates separation of the right to record from the right to give public performances for profit and points clearly to the reasons why recording companies are not interested in performance rights.

CONCLUSION

This case presents issues that are not of general public importance warranting the consideration of this Court. The decisions of the Court of Appeals and the District Court were correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON H. RIFKIND
575 Madison Avenue
New York, N. Y. 10022

J. PAUL COIE
1900 Washington Building
Seattle, Washington 98101
Attorneys for Respondents

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

HOLMAN, MARION, PERKINS, COIE & STONE
Seattle, Washington
Of Counsel.

June 7, 1967

Appendix A

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants.*	Civil Action No. 13-95 AMENDED FINAL JUDGMENT

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

NOW, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect

of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or

enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compostions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public per-

formance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee

of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis

for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user

and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of

dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the

various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and

the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ACSAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest

in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintaining or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

Appendix A

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members

of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives

of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time

after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

VIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved:

March 14, 1950

HENRY W. GODDARD
United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

SIGMUND TIMBERG
Special Assistant to the
Attorney General
WILLIAM D. KILGORE, JR.
HAROLD LASSER
Special Attorneys

HERBERT A. BERGSON
Assistant Attorney General
MELVILLE C. WILLIAMS
Special Assistant to the
Attorney General
IRVING H. SAYPOL
United States Attorney

For the defendants

ROBERT P. PATTERSON
HERMAN FINKELSTEIN
OSCAR COX
SCHWARTZ & FROHLICH
By LOUIS D. FROHLICH

Judgment entered:

WILLIAM V. CONNELL
Clerk
March 14, 1950